(5)

Supreme Court, U.S.
FILED
JAN 21 1993
OFFICE OF THE CLERK

No. 92-1046

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

NATIONAL UNION FIRE INSURANCE CO. OF PITTSBURGH, PA.,

Petitioner,

vs.

JOHN R. CAMP, JR., TRUSTEE, and SECURITIES INVESTOR PROTECTION CORPORATION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

---

OPPOSITION OF RESPONDENTS TO MOTION OF AMERICAN INSURANCE ASSOCIATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF

NEAL B. SHNIDERMAN
ADORNO & ZEDER, P.A.
2601 South Bayshore Drive
Suite 1600
Miami, Florida 33133
Telephone: (305) 858-5555
Attorneys for John R. Camp, Jr., Trustee

THEODORE H. FOCHT
General Counsel
Counsel of Record
SECURITIES INVESTOR PROTECTION CORPORATION
805 Fifteenth Street, N.W.
Suite 800
Washington, D.C. 20005
Telephone: (202) 371-8300

Of Counsel:

MICHAEL E. DON
Deputy General Counsel

JOSEPHINE WANG
Associate General Counsel

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
PRELIMINARY STATEMENT	1
ARGUMENT	2
1. The Amicus Brief Restates NUFIC's Argument As To The Bank Cases.	3
2. The Issue As To Constitutionality Is Untimely Raised.	4
3. The Constitutional Issue Lacks Merit.	5
4. The Amicus Brief Reflects a Misunderstanding of SIPA.	6
CONCLUSION	8

TABLE OF AUTHORITIES

CASES:	Page
A.H. Robins Co. v. Piccinin, 788 F.2d 994 (4th Cir.), *cert. den.*, 479 U.S. 876 (1986)	5
In re Bell & Beckwith, 937 F.2d 1104 (6th Cir. 1991)	7
Duignan v. United States, 274 U.S. 195 (1927)	4
Exchange National Bank of Chicago v. Wyatt, 517 F.2d 453 (2d Cir. 1975)	3,6
Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380 (1947)	5
Matter of Gulf Tampa Drydock Co., 49 B.R. 154 (Bankr. M.D. Fla. 1985)	5
Hormel v. Helvering, 312 U.S. 552 (1941)	4
In re Prima Co., 88 F.2d 785 (7th Cir. 1937)	5
SEC v. Aberdeen Securities Co., 480 F.2d 1121 (3d Cir.), *cert. den. sub nom., Seligsohn v. SEC*, 414 U.S. 1111 (1973)	3
SEC v. Albert & Maguire Sec. Co., 378 F.Supp. 906 (E.D. Pa. 1974)	6
Singleton v. Wulff, 428 U.S. 106 (1976)	4
SIPC v. Ambassador Church Finance/Development Group, Inc., 788 F.2d 1208 (6th Cir.), *cert. den. sub nom., Pine Street Baptist Church v. SIPC*, 479 U.S. 850 (1986)	3
SIPC v. Associated Underwriters, Inc., 423 F.Supp. 168 (D. Utah 1975)	7
Tepper v. Chichester, 285 F.2d 309 (9th Cir. 1960)	6
Wright v. Union Central Ins. Co., 304 U.S. 502 (1938)	5

Table of Authorities Continued

	Page
CONSTITUTION OF THE UNITED STATES:	
Art. I, §8, cl. 3	6
Art. I, §8, cl. 4	5
STATUTES AND RULES:	
Securities Investor Protection Act of 1970, as amended, 15 U.S.C. §	
78eee(b)(4)	2
78eee(d)	3
78fff(a)(4)	6
78fff(b)	2,3
78fff-3(a)	7
78jjj(b)	6
Bankruptcy Code, 11 U.S.C. §	
109(b)(2)	4
541(c)(1)(B)	2,3 *passim*
Other Statutory Provisions	
12 U.S.C. §1821(e)(12)(A)	4
Rules	
Rules of the Supreme Court of the United States	
37.4	1
LEGISLATIVE MATERIALS:	
S. Rep. No. 989, 95th Cong., 2d Sess. (1978)	4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1046

NATIONAL UNION FIRE INSURANCE CO.
OF PITTSBURGH, PA.,

Petitioner,

VS.

JOHN R. CAMP, JR., TRUSTEE,
and SECURITIES INVESTOR PROTECTION CORPORATION,

Respondents.

OPPOSITION OF RESPONDENTS TO MOTION OF AMERICAN INSURANCE ASSOCIATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF

PRELIMINARY STATEMENT

Pursuant to Rule 37.4 of this Court, John R. Camp, Jr., the Trustee for the liquidation of Government Securities Corporation ("GSC"), and the Securities Investor Protection Corporation ("SIPC") submit this opposition to the motion of American Insurance Association ("the Association") for permission to file an *amicus curiae* brief in this case.[1] The motion should be denied because the Association, which is appearing in this case for the first time, raises no relevant matter. By and large, its brief merely

---

[1] Motion to File Brief of *Amicus Curiae* and Brief of *Amicus Curiae* American Insurance Association In Support of Petition for Writ of Certiorari, dated January 7, 1993. References herein to the motion shall be to "*amicus* motion," and to the brief, "*amicus* brief".

restates the arguments made by National Union Fire Insurance Co. of Pittsburgh, PA. ("NUFIC"), in its petition for a writ of certiorari ("Cert. Pet.") herein. Furthermore, the constitutional issue which the Association asserts, in addition to having no merit, has never been raised by any party or considered by any court in this case. These reasons and others for denying the motion are discussed in more detail below.

ARGUMENT

This adversary proceeding arises within the liquidation proceeding under the Securities Investor Protection Act, 15 U.S.C. §78aaa *et seq.* ("SIPA"),[2] of GSC, formerly a securities broker-dealer. On May 12, 1987, on an application by SIPC, the United States District Court for the Southern District of Florida placed GSC in liquidation, appointed Mr. Camp as trustee, and removed the liquidation proceeding to the Bankruptcy Court for the same district. SIPA §78eee(b)(4). Petitioner NUFIC had issued a fidelity bond to GSC to protect it against damages resulting, among other things, from dishonest acts of its employees. Because such acts had taken place and damages had resulted, the Trustee filed a claim under the bond. NUFIC refused to honor the claim based on a provision of the bond which, in pertinent part, automatically terminated the bond upon the appointment of a liquidator ("the termination clause"). The Trustee filed the instant suit, seeking declaratory relief that under section 541(c)(1)(B) of the Bankruptcy Code, made applicable by SIPA section 78fff(b), the termination clause was invalid.[3]

---

[2] "References herein to provisions of SIPA shall be to the United States Code, and for convenience, hereinafter shall omit "15 U.S.C."

[3] The Association incorrectly asserts that the termination clause was held invalid "[u]pon application of the SIPC." *Amicus* motion at 2. In fact, the instant suit was initiated by the Trustee and not SIPC. SIPC's participation in this matter has been pursuant to SIPA section 78eee(d).

The issue of whether section 541(c)(1)(B) applies has been addressed by three courts in this case—the most recent one being the Eleventh Circuit. Unanimously, these courts have concluded that section 541(c)(1)(B) applies. The decision of the Eleventh Circuit does not conflict with the decision of any other court. Nevertheless, relying upon cases involving thrifts and a bank in conservatorship or receivership (collectively, "the Bank cases"), in which termination clauses were upheld, NUFIC has attempted to create a conflict where none exists. See Cert. Pet. at 3-4.

1. The Amicus Brief Restates NUFIC's Argument As To The Bank Cases.

The Bank cases are not relevant because they involve different facts, different insured institutions, and most importantly, different statutes. Because notwithstanding its special customer protection features, a SIPA proceeding essentially is a bankruptcy liquidation,[4] provisions of Title 11, including section 541(c)(1)(B), are made applicable to SIPA cases under SIPA section 78fff(b). However, the same provisions cannot apply to banks and thrifts. As set forth in the legislative history of the Bankruptcy Reform Act of 1978, "[b]anking institutions . . . are excluded from liquidation under the bankruptcy laws because they are bodies for which alternate provision is made for their liq-

---

Under that section, SIPC is "a party in interest as to all matters arising in a liquidation proceeding, with the right to be heard on all such matters."

[4] *SIPC v. Ambassador Church Finance/Development Group, Inc.*, 788 F.2d 1208, 1210 (6th Cir.), *cert. den. sub nom., Pine Street Baptist Church v. SIPC*, 479 U.S. 850 (1986) ("[e]ssentially, a liquidation under the SIPA is a bankruptcy proceeding"); *SEC v. Aberdeen Securities Co.*, 480 F.2d 1121, 1123 (3d Cir.), *cert. den. sub nom., Seligsohn v. SEC*, 414 U.S. 1111 (1973); *Exchange National Bank of Chicago v. Wyatt*, 517 F.2d 453, 456-459 (2d Cir. 1975).

uidation under various State or Federal regulatory laws." S. Rep. No. 989, 95th Cong., 2d Sess. at 31 (1978), *reprinted in* 1978 U.S. CODE CONG. & ADM. NEWS 5817. See 11 U.S.C. §109(b)(2) (excluding banks and thrifts from liquidation under Title 11). Not only are stockbrokers and thrifts and banks liquidated under different laws, but as to the latter, Congress explicitly has enunciated a different policy with respect to the enforcement of contracts such as the one at hand. Thus, while it has expressed its intent under 11 U.S.C. section 541(c)(1)(B), that trustees recover under such bonds in stockbroker liquidations, it prohibits, under 12 U.S.C. section 1821(e)(12)(A), bank receivers or conservators from seeking a similar recovery. The Bank cases have been extensively addressed both in the certiorari petition and the joint opposition thereto. See Cert. Pet. at 3-21; and Respondents' Opposition thereto, dated January 15, 1993, at 6-21. By merely expounding upon NUFIC's arguments, the Association adds nothing to the analysis. Instead, it obscures the issue in this case, by seeking to have law that is irrelevant applied to its resolution.

2. The Issue As To Constitutionality Is Untimely Raised.

The Association's motion also should be denied because it interposes a constitutional question that was never raised by any party to this case or considered by any court below. Application of the general rule that federal appellate courts do not review issues not passed upon by the lower courts, is particularly appropriate here. *Duignan v. United States*, 274 U.S. 195, 200 (1927); *Hormel v. Helvering*, 312 U.S. 552, 556 (1941); *Singleton v. Wulff*, 428 U.S. 106, 120 (1976). There is no record upon which this Court may decide the issue, and at this late juncture it is patently unfair to the creditors of GSC, the Trustee, and SIPC, that they be surprised with a new issue, and that the litigation be prolonged by its resolution.

3. The Constitutional Issue Lacks Merit.

In any event, the Association's claim as to any purported lack of constitutionality is without merit. The contract between NUFIC and GSC was not impaired and there has been no unconstitutional taking of property. Section 541(c)(1)(B) of the Bankruptcy Code, made applicable by SIPA, had been in effect for nearly ten years when NUFIC issued the fidelity bond to GSC. Consequently, NUFIC knew that the termination clause would not be enforced if a liquidator was appointed for GSC.[5] See *In re Prima Co.*, 88 F.2d 785, 788 (7th Cir. 1937) ("parties to a contract are, of necessity, aware of the existence of, and subject to, the power of Congress to legislate on the subject of bankruptcies. They were and are chargeable with knowledge that their rights and remedies . . . are affected by existing bankruptcy laws. . . ."); *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384 (1947) ("everyone is charged with knowledge of the United States Statutes at Large"); *Wright v. Union Central Ins. Co.*, 304 U.S. 502, 516 (1938) ("existing laws read into contracts in order to fix obligations as between the parties"). In issuing the bond to GSC, NUFIC measured the risk and determined that the benefit to it outweighed that risk.

Moreover, under the facts of this case, there can be no genuine question as to the authority of Congress to legislate as it has under section 541(c)(1)(B) pursuant to its bankruptcy power. U. S. CONST., Art. I, §8, cl. 4. This conclusion is reinforced by the fact that the power to enact

---

[5] At the time NUFIC issued the bond, the case law was clear that insurance contracts constituted property of the estate under section 541(a) of the Bankruptcy Code. *A. H. Robins Co. v. Piccinin*, 788 F.2d 994, 1001-1002 (4th Cir.), *cert. den.*, 479 U.S. 876 (1986). Since that property was subject to other provisions of the Code, see, *e.g.*, *Matter of Gulf Tampa Drydock Co.*, 49 B.R. 154, 157 (Bankr. M.D. Fla. 1985), it would have come as no surprise to NUFIC that it would be subject to section 541(c)(1)(B) thereof as well.

SIPA, and thereby to make section 541(c)(1)(B) applicable to a SIPA case, is grounded not only in the bankruptcy clause, *id.*, but also in the commerce clause. U.S. CONST., Art. I, §8, cl. 3. *SEC v. Albert & Maguire Sec. Co.*, 378 F.Supp. 906, 911-912 (E.D. Pa. 1974); *Exchange National Bank of Chicago v. Wyatt*, 517 F.2d 453, 459 (2d Cir. 1975). *See Tepper v. Chichester*, 285 F.2d 309, 312-313 (9th Cir. 1960). Even assuming, *arguendo*, that such were the case here, "the power of Congress to modify substantial rights [under SIPA] rests upon a broad and substantial base." *SEC v. Albert & Maguire Sec. Co.*, *supra*, 378 F.Supp. at 912.

4. The Amicus Brief Reflects a Misunderstanding of SIPA.

Finally, the motion for permission to file an *amicus* brief herein should be denied because it reflects a fundamental misunderstanding of SIPA, and proceedings thereunder, and therefore, is potentially misleading. The Association contends that the decision of whether to issue a bond is based upon the insurer's assessment of the honesty of existing officers of the insured, and their ability to hire and supervise trustworthy employees. Because the take-over of the insured by a third party requires the insurer to underwrite the honesty of strangers, the bond is terminated. *Amicus* brief at 1-2. The Association overlooks the fact that because the objective of a SIPA proceeding is the liquidation of the debtor, there is no continuation of the debtor's business upon the trustee's appointment, and therefore, no underwriting of the honesty of strangers. SIPA §78fff(a)(4). Upon appointment of the trustee, the debtor is expressly prohibited from engaging in business. §78jjj(b). From the time of the Trustee's appointment, the debtor no longer has employees whose acts are covered under the bond. Thus, as in the current case, a SIPA trustee's claim is based on losses caused by employees retained by the officers whose honesty was assessed by the insurer in underwriting the bond. Otherwise stated,

the losses are the very ones which the insurer contracted to insure.

Finally, the Association also incorrectly concludes that the Trustee's claim under the bond is an attempt to have NUFIC satisfy losses that otherwise would be satisfied by SIPC. *Amicus* brief at 19. Plainly, SIPA does not contemplate that SIPC funds take the place of a debtor's estate. Thus, to the extent of its advances to satisfy the claims of customers, SIPC is subrogated to those customers' claims against, among others, the estate. SIPA §78fff-3(a). See *In re Bell & Beckwith*, 937 F.2d 1104, 1106-1110 (6th Cir. 1991). Moreover, there is no protection under SIPA either for customers whose claims exceed the monetary limits of SIPA protection or for general creditors. *SIPC v. Associated Underwriters, Inc.*, 423 F.Supp. 168, 170-173 (D. Utah 1975). Those categories of creditors also potentially share in any proceeds recovered under a bond.

CONCLUSION

For the foregoing reasons, the motion of American Insurance Association for permission to file an *amicus curiae* brief should be denied.

Respectfully submitted,

NEAL B. SHNIDERMAN
ADORNO & ZEDER, P.A.
2601 South Bayshore Drive
Suite 1600
Miami, Florida 33133
Telephone: (305) 858-5555
Attorneys for John R. Camp, Jr., Trustee

THEODORE H. FOCHT
General Counsel
Counsel of Record
SECURITIES INVESTOR PROTECTION CORPORATION
805 Fifteenth Street, N.W.
Suite 800
Washington, D.C. 20005
Telephone: (202) 371-8300

Of Counsel:

MICHAEL E. DON
Deputy General Counsel

JOSEPHINE WANG
Associate General Counsel

Date: January 21, 1993